

***Once Is Never Enough:  
Annualization of Per Occurrence Limits in Three-Year Policies***

**By  
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As allocation law enters its second decade, threshold questions raised by long-tail environmental and toxic tort claims, such as trigger of coverage and allocation formulas, have been resolved in many jurisdictions. Increasingly, insurance companies, policyholders and courts are grappling with more subtle allocation issues, including the treatment of non-cumulation and deemer clauses, the application of deductibles and retrospective premiums, and the number of per occurrence limits available for multi-year policies or for "stub" policies of less than one year.

This article discusses policies written on a three-year basis and the treatment courts have accorded the issue of annualization of per occurrence limits in those policies. For purposes of this article, "annualization" refers to the policyholder's ability to recover a policy's per occurrence limit on an annual basis – that is, three times – over the three-year policy period. The availability of more than one per occurrence limit in annual

policies extended by endorsement or the availability of a full per occurrence limit in a “stub” policy will not be addressed.

## **I. Background**

Contemporary sources from the 1970s and 1980s suggest that policyholders purchasing three-year policies did so to “lock in” favorable premium rates during periods when the insurance market was soft. Philip Gordis and Edward Chlanda, Property and Casualty Insurance, at 420 (29<sup>th</sup> ed. 1984). Three-year policies also reduced frictional (transactional) costs, created loyalty to the underwriter and provided additional premium savings when net present value was factored into the premium payment. Annualization of per occurrence limits for three-year policies was evidently standard practice in the insurance industry during this period. See Society of Roman Catholic Church of Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co., 126 F.3d 727, 742 (5<sup>th</sup> Cir. 1997) (noting that a three-year policy without an annualization clause was not a “standard” policy).

Although there is apparently no dispute that the per occurrence limits for three-year policies were typically annualized, courts have generally held that policyholders are only able to recover more than one per occurrence limit if the policy in question contains a clause specifically providing for annualization. See, e.g., id. Not surprisingly, considerable dispute exists as to what constitutes an “annualization clause” for these purposes.

## **II. Applicable Primary Policy Language**

Pre-1986 standard-form ISO<sup>1</sup> commercial general liability policies generally

contained a variation of one of the following two provisions in the:

THREE YEAR POLICY . . . If this policy is issued for a period of three years, **any limit of the Company's liability stated in this policy as "aggregate"** shall apply separately to each consecutive annual period thereof.

(Emphasis supplied) (hereinafter "Provision A"), or

THREE YEAR POLICY . . . . If this policy is issued for a period of three years, **the limits of the Company's liability** shall apply separately to each consecutive annual period thereof.

(Emphasis supplied) (hereinafter "Provision B").

As is the case with much insurance law, courts have not interpreted this language with any degree of consistency. Neither provision has been uniformly held to allow annualization and, in fact, there is case law against annualization under either provision.

### **III. Applicable Umbrella or Excess Policy Language**

The language in umbrella or excess policies is less uniform than that found in standard-form ISO primary policies (for purposes of this article, umbrella and excess policies will be analyzed together and referred to as "excess" policies). Excess policies usually do not contain "Three Year Policy" provisions and are generally silent on the issue on the issue of annualization. Instead, excess policies merely set forth per occurrence limits and aggregate limits (where applicable), with the insurance company agreeing to indemnify the policyholder for sums it is liable to pay "arising out of an occurrence happening during the contract period."

The term "occurrence" is typically defined to mean:

an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

Excess policies generally contain additional restrictions on the insurance company's limit of liability, such as the following:

In no event shall the Company be liable for an amount in excess of that set forth in the Declarations as applicable to "each occurrence."

The manner in which courts analyze the interaction between the policy provision defining "occurrence" and the policy provision defining the insurance company's limit of liability generally – but not always – determines whether per occurrence limits will be annualized in multi-year excess policies. Unfortunately, as with primary policies, courts addressing this issue in excess policies have not done so consistently.

#### **IV. Other Factors to Consider When Analyzing Annualization**

In addition to the language of the policy at issue, three other factors may help establish whether the parties intended the policy's per occurrence limits to annualize.

First, policy premiums may indicate an intent to annualize the policy's per occurrence limits. As one insurance industry attorney recently noted, "if the premiums paid for a three-year policy are equivalent to the premiums paid for a single-year policy, a single limit result would seem to be justified." William Shelley, Determining and Valuing the

"Available Coverage," at 8, presented at Mealey's Insurance Allocation Conference 2000, West Palm Beach, Florida (Jan. 13-14, 2000). Although premium comparison arguments seem compelling, at least one court has considered them and remained unswayed. See CSX Transp., Inc. v. Commercial Union Ins. Co., 82 F.3d 478, 483 (D.C. Ct. App. 1996) ("[n]or are we convinced by [the policyholder's] premium argument . . . [as to] the illogic of paying the same premium for a three-year policy as for three one-year policies").

The second factor to consider is whether the policy is broken down into annual periods. Language stating that a policy is comprised of three "[annual] periods of insurance," implies that the parties intended the policy's limits to be available on an annual basis. See Diamond Shamrock Chemicals Co. v. Aetna Cas. & Surety Co., 609 A.2d 440, 468 (N.J. Super. A.D. 1992), cert. denied, 634 A.2d 528 (N.J. 1993) (requiring annualization of per occurrence limits under three-year policy that states it is "comprised of three consecutive annual periods . . . . [and c]omputation and adjustment of earned premiums shall be made at the end of each annual period").

Finally, the insurance company's reinsurance market (in the form of the policies reinsuring the three-year policy) or the excess policies above the three-year policy may provide additional evidence as to the availability of more than one per occurrence limit in that policy. As the Fifth Circuit noted with approval in Society of Roman Catholic Church of Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co., 126 F.3d 727, 742 (5<sup>th</sup> Cir. 1997), "the district court determined that . . . 'common sense dictates that the excess carrier . . . must know the material details of the underlying policy.'" While not dispositive, the understanding of the insurance professionals who reinsured, brokered or sold the excess

insurance policies can provide evidence of the intent of the parties regarding annualization at the time the policies were issued.

**V. Case Law Applying Per Occurrence Limits on a Per Policy Basis**

The majority of courts interpreting the annualization of per occurrence limits in three-year policies have found that they apply on a per policy basis only.

**A. Diocese of Lafayette v. Interstate Fire**

For instance, in Society of Roman Catholic Church of Diocese of Lafayette and Lake Charles, Inc. v. Interstate Fire & Cas. Co., 26 F.3d 1359 (5<sup>th</sup> Cir. 1994) (“Diocese I”), a case involving child abuse, the Fifth Circuit upheld the District Court’s ruling that the policyholder was only entitled to one per occurrence limit for two three-year primary policies.

The coverage at issue in Diocese I was made up of two consecutive three-year primary policies sold by Fireman’s Fund and Preferred Risk, respectively. Over these primary policies were two excess policies: a four-year policy sold by Houston General, followed by a two-year policy sold by Pacific Employers. Unfortunately, Diocese I does not set forth the relevant policy provisions of any of these policies in detail. In its analysis in Diocese I, the court first looked at the nature of the underlying claims and determined that coverage was triggered by each child molested during each policy period. Id. at 1365. Then, once the policy was triggered, all subsequent incidents during the policy period constituted “repeated exposure to [the same] conditions” and were therefore part of the same occurrence. Id. at 1366.

Fireman's Fund and Preferred Risk, each with a triggered three-year primary policy, apparently took the position that their policies should not annualize. Houston General, with a four-year policy over both the Fireman's Fund policy and the first year of the Preferred Risk policy, argued that each of these three-year policies should be treated as three one-year policies, that is, their per occurrence limits should be annualized. Id. The court was not persuaded by Houston General's argument, holding instead that:

Clearly, a three-year "occurrence" policy provides less coverage than three one-year policies, because an occurrence could last longer than one year. While an insurance policy should be interpreted in favor of the insured, we see no justification for providing more insurance coverage than the insured bargained for.

Id. As a result, the policyholder's recovery under the Fireman's Fund and Preferred Risk primaries was capped at one per occurrence limit per child per policy. Accord General Refractories Co. v. Allstate Ins. Co., 1994 WL 246274 (E.D. Pa. June 8, 1994) (granting summary judgment to insurance company for three-year excess policy with no annualization clause where policy provided per occurrence limit available only once during policy period).

In the aftermath of Diocese I, the second excess carrier, Pacific Employers, sued the insurance agent for the Diocese on the grounds of negligent misrepresentation, based primarily on the fact that the Preferred Risk policy under it did not annualize and was therefore "substandard" at the time it was sold. In Society of Roman Catholic Church of Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co., 126 F.3d 727 (5<sup>th</sup> Cir. 1997) ("Diocese II"), it was the Diocese's agent who argued that the three-year Preferred Risk

primary should annualize. The Fifth Circuit, affirming the District Court's ruling in favor of Pacific Employers and against the insurance agent, provided helpful insights into insurance industry practice on the issue of annualization.

For instance, according to the Diocese's agent, at the time the policies at issue were sold (1975-1981), it was standard practice in the insurance industry to treat a three-year policy as three one-year policies. Id. at 742. Further, the Fifth Circuit agreed that there was no dispute that three-year policies were typically annualized, only a dispute as to whether the three-year policies had to contain an annualization clause in order to do so. Id. The expert for the Diocese testified, and both the District Court and the Fifth Circuit agreed, that industry practice was not that all three-year policies would be annualized, but that three-year policies with an annualization clauses would be annualized, while three-year policies without these clauses would not be annualized. Id. Unfortunately, neither Diocese I nor Diocese II provides any guidance as to what constitutes an "annualization clause" under these circumstances.

**B. *Diamond Shamrock v. Aetna***

In the absence of annualization clauses, annualization was also rejected for the three-year excess policies at issue in Diamond Shamrock Chemicals Co. v. Aetna Cas. & Surety Co., 609 A.2d 440 (N.J. Super. Ct. App. Div. 1992), cert. denied, 634 A.2d 528 (N.J. 1993) ("Diamond Shamrock"), a case involving coverage for Agent Orange product liability claims.

The excess policies before the court in Diamond Shamrock did not have

aggregate limits, but instead limited coverage to any liability “arising out of an occurrence happening during the contract period” up to “a further [amount] in respect to each occurrence.” 609 A.2d at 468. The policyholder in Diamond Shamrock argued that these policies should provide coverage up to one per occurrence limit per year. The court disagreed, noting that, “[u]nfortunately, none of the excess insurance policies contained a[n annualization] clause” similar to that found in Diamond Shamrock’s three-year primary policy. Id. Consequently, the court determined that:

As to applicable policy limits, the excess policies restrict liability to the “ultimate net loss in excess of the amount recoverable under underlying insurance” but “then only up to a further [dollar amount] in respect of each occurrence.” An “occurrence” is defined in the same manner as the primary policy, but it specifically refers to the policy period.

Thus, the excess policies establish a single limit of liability for an occurrence without regard to whether the injury or injuries attributable to the occurrence take place at the same time, in one year, or over three years.

Id. This lack of an annualization clause was once again considered dispositive. As a result, because none of Diamond Shamrock’s excess policies contained annualization provisions, the District Court upheld the lower court’s ruling that the policyholder was entitled to recover only one per occurrence limit for each of these three-year policies. Id.

However, Diamond Shamrock does not unequivocally support capping multi-year policies at one per occurrence limit. As discussed in more detail below, although the excess policies in Diamond Shamrock were not annualized, the three-year primary policies were.

**C. Hercules v. Aetna**

Likewise, in Hercules Inc. v. Aetna Casualty and Surety Co, 1998 WL 962089 (Del. Super. Ct. Sept. 30, 1998) (“Hercules”), an environmental property damage case, the Delaware Superior Court also held that the policyholder was only entitled to recover one per occurrence limit under the multi-year London Market excess policies before it. Once again, the language of the policies at issue was not spelled out. However, London Market policies generally contain language similar to that set forth as typical excess policy language in Section III, supra, and usually do not contain annualization language comparable to either Provision A (“‘aggregate’ shall apply separately”) or Provision B (“limits . . . shall apply separately”).

The policyholder in Hercules contended that:

The Limit of Liability section makes clear that [London Market’s] limit of liability with respect to certain types of coverage contained a cap or an aggregate limit for each annual policy period of the face amount of the policy of \$10 million above the \$2 million self-retention.

Specifically, the Limits of Liability section states that there are aggregate limits for certain types of coverage for “each annual period” or “in any one policy year.”

Hercules at \*5-6.

Like Diocese I and II, Hercules is instructive because the insurance companies with multi-year policies split on the annualization issue. One of the excess carriers, American Home, agreed with the position taken by the policyholder and argued in favor of annualization. American Home sold Hercules a high-level two-year excess policy

over a \$2 million self-insured retention (“S.I.R.”). Although the decision was not clear on which policies American Home thought should be annualized, it apparently argued for annualization of both its own policy and the underlying London Market policies, subject to an annualized S.I.R. American Home based its position on “the ‘policy year’ provision, the fact that premiums and underwriting packages were due each year, and the annual signing requirement.” Id. at \*6.

Unlike American Home, London Market contended that its first layer excess policies unambiguously provided for only one limit per occurrence, not one per occurrence limit per year. Id. Even London Market conceded, however, that some of the multi-year policies sold to Hercules should annualize. In arguing against annualization of its own policies, London Market pointed out that Hercules was insured by some multi-year policies which unequivocally provided for annualization, including a three-year North River excess policy. Id. Further, Hercules could have had similar annual limits written into its London Market policy, but did not.<sup>2</sup> Id.

In its decision, the court agreed with London Market that the London Market policies “plainly state that an occurrence is covered up to the policy limits,” and thus “for multi-year policies, the insured can recover for [only] one occurrence.” Id. The court further found that this position was supported by what it deemed to be “considerable” case law, and refused to read “implicit” annual occurrence limits into the London Market policies, as it felt it was urged to do by Hercules. Id.

Nonetheless, the court did not restrict the number of per occurrence limits

available under Hercules' other multi-year policies, such as the American Home policy or the North River policy, which presumably were annualized.<sup>3</sup> Id. at \*5. Thus, Hercules joins Diocese II and Diamond Shamrock, in only limiting a policyholder's recovery to one per occurrence limit if the policy at issue does not contain an annualization clause.

**D. *Air Products v. Hartford***

Lack of an annualization clause and a unique annualization provision also precluded annualization in Air Products and Chemicals, Inc. v. Hartford Accident and Indemnity, 1989 WL 73656 (E.D. Pa. June 30, 1989). The policies at issue in Air Products were two three-year primaries sold by Liberty Mutual. From the language quoted in the decision, the policies appear to have contained unique wording consisting of a "multiple policies" provision, which provided that the occurrence limit of a particular policy "is '\$500,000 for the [first] policy, or \$1,000,000 for the [second] policy.'" Id. at \*1. In a somewhat terse decision, the court found the policyholder's position that each year had a separate per-occurrence limit was contrary to the quoted language, and therefore limited its recovery to one per occurrence limit per policy. Id.

**E. *Outboard Marine v. Liberty Mutual***

Although Diocese I and II, General Refractories, Diamond Shamrock, Hercules and Air Products laid a reasonably solid groundwork for a logical analysis of the annualization issue, any hope of courts analyzing these provisions consistently was dashed by Outboard Marine Corp. v. Liberty Mutual Ins. Co., 670 N.E.2d 740 (Ill. App. Ct. 1996), as modified on other grounds on denial of rehearing (Sept. 16, 1996), appeal denied 675

N.E.2d 634 (Ill. 1996). In Outboard Marine, an Illinois Appellate Court refused to annualize policies containing the same language which London Market admitted required annualization in Hercules.

The Limits of Liability section of the excess policy at issue provided:

The company shall only be liable for the ultimate net loss in excess of

\* \* \*

the amount recoverable under the underlying insurance set forth in the Declarations.

In no event shall the company be liable for an amount in excess of that set forth in the Declarations as applicable to “each occurrence.”

Id. at 649. However, the policy further provided that:

Subject to the limit of liability with respect to “each occurrence” the aggregate limit of liability set forth in the Declaration applies separately to claims arising under the insurance afforded for Products Liability and to those arising out of personal injury by Occupational Disease sustained by any employee of the insured. If the policy is written for a period of more than one year, the limits of liability apply separately to each annual period that this policy remains in force.

Id. This three-year policy provision is similar to Provision B in that it is not on its face restricted to aggregate limits and, logically, should require annualization of the policies per occurrence limits as well.

Employers Surplus Lines Insurance Company (“ESLIC”), the excess insurance company whose policy was at issue, argued that this language was “clear” and only provided a limit of \$1,000,000 for each distinct occurrence. Id. at 650. In support of its position, ESLIC relied on the sentence “[i]n no event shall the company be liable for an

amount in excess of the amount set forth in the Declarations” as applicable to each occurrence. Id.

In contrast, the policyholder contended that the Limits of Liability section, when read with the policy as a whole, was ambiguous. Id. Under the policyholder’s interpretation, the phrase “limits of liability apply separately to each annual period” clause modified the per occurrence limits as set forth in the declaration. Id.

Surprisingly, although the annualization language was unrestricted and should have applied to both the policy’s per occurrence limits and its aggregate limits, the court nonetheless ruled in favor of ESLIC. In refusing to annualize the policy’s per occurrence limits, the court held that the policy, when taken as a whole, was unambiguous. Id. The court was not persuaded by the policyholder’s arguments, finding instead that the “annual period” language only modified the sentence preceding it, which was expressly limited by “reiterating that it is [s]ubject to the limit of liability with respect to “each occurrence”.” Id.

#### **F. Other Cases Limiting Annualization**

As previously noted, most decisions addressing annualization do not discuss the policy language at issue in sufficient detail for insurance companies, policyholders or other courts to understand how the results were reached or to predict how the issue will be treated in the future. Although the courts’ continuing reluctance to quote relevant policy language in detail prevents a definitive analysis, the following cases appear to support the proposition that annualization should be restricted only where the policies at issue do not

contain annualization clauses.

For instance, in CSX Transportation, Inc. v. Commercial Union Ins., 82 F.3d 478, 483 (D.C.Cir. 1996), the court ruled against annualization without citing policy language other than the clause providing coverage “for ‘the excess of loss . . . from any one occurrence or series of occurrences arising out of any one event, and then only up to \$(x) for each occurrence.’” Presumably the policies at issue contained no annualization provision because, as the court stated, the coverage limitation section was “devoid of any language suggesting that ‘each occurrence’ should be read as ‘each occurrence each year.’” The same inference about lack of an annualization clause driving an adverse decision can be drawn from Western Pneumatic Tube Co. v. Travelers Indemnity Co., No. 88-2-10984-2, hearing transcript at 18-20 (Wash. Super. Ct. King Cty. Jan. 18, 1991), where the court merely commented that the policy did not explicitly provide that limits were to be applied annually.

Likewise, both Chesapeake & Ohio Railway Co. v. Certain Underwriters at Lloyds, Civ. No. 85-3162/63, slip op. at 12-13 (D.D.C. Aug. 30, 1993), reprinted in Mealey’s Litigation Reports: Insurance, Sept. 14, 1993, and State v. Underwriters at Lloyds, No. 239784, slip op. at 12-13 (Cal. Super. Ct. Riverside Cty. June 10, 1999), reprinted in Mealey’s Litigation Reports: Insurance, July 7, 1999, ruled against annualization under what was presumably standard London Market policy language. As noted in the analysis of Hercules, supra, these policies often do not contain annualization clauses.

**VI. Case law supporting annualization of per occurrence limits**

New Jersey is currently the only jurisdiction where per occurrence limits are consistently repeated for three-year policies.

**A. Diamond Shamrock v. Aetna**

In some cases, New Jersey courts have annualized multi-year policies based on the language of the policies at issue. As previously discussed, the New Jersey Superior Court in Diamond Shamrock refused to allow the policyholder to recover multiple per occurrence limits under excess policies which did not contain an annualization clause in any form. However, the Superior Court commented with approval on the lower court's ruling requiring annualization for Diamond Shamrock's three-year primary policy. Diamond Shamrock, 609 A.2d at 469.

As the court noted, the reason the primary policies were annualized and the excess policies were not annualized was that the policies contain different language in their respective limitations sections. Id. at 468. The primary policies had a three-year policy provision similar to Provision A, providing:

A policy period of three years is comprised of three consecutive periods . . . . Computation and adjustment of earned premiums shall be made at the end of each annual period. Aggregate limits of liability as stated in this policy shall apply separately to each annual period.

Id. at 468.

This annualization provision is limited on its face to aggregate limits, and

would appear to be more restrictive than the language under which the Illinois Court of Appeals refused to allow annualization in Outboard Marine. Nonetheless, the New Jersey Superior Court concurred with the lower court's ruling that the per occurrence limits in this policy should be annualized – and in doing so brought further confusion to the analysis of the annualization issue. Although the lower court's reasoning was not discussed in detail, the different treatment accorded annualization of Diamond Shamrock's primary insurance policies appears to be based at least in part on the fact that the policy period was annualized and the premiums were computed annually. Id.

**B. Chemical Leaman v. Aetna**

More recently, New Jersey courts have found that the per occurrence limits of a three-year policy should repeat annually without consulting the policy language.

For instance, in Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Surety Co., 978 F. Supp. 589 (D.N.J. 1977), rev'd on other grounds, 177 F.3d 210 (3<sup>rd</sup> Cir. 1999), policy language was not considered. Once again, the excess policies at issue were sold by London Market, and presumably contained standard London Market language. Neither the policyholder nor London Market disputed that the multi-year London Market policies contained only a single per occurrence limit per policy. Id. at 606. London Market took the position that the policy language was dispositive and that continuous environmental property damage constituted a single occurrence across all triggered policy years. Id. However, the policyholder argued that, under an earlier Third Circuit decision in the case, the property damage at issue – although continuous and indivisible – had to be

treated as a separate and distinct occurrence in each of the years of a triggered policy. Id.

The court agreed with the policyholder.

The District Court began its analysis of the issue, which it considered a matter of first impression, by examining the New Jersey Supreme Court's ruling in Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994) ("Owens-Illinois"). In Owens-Illinois, the New Jersey Supreme Court found that trigger and allocation were inextricably linked and, as a result, resolution of the trigger-of-coverage issue required that scope of coverage also be addressed. Id. at 985. Further, Owens-Illinois expressly adopted the allocation formula set forth in Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4<sup>th</sup> 1 (Cal. Ct. App. 1996), review denied (Aug. 21, 1996). Chemical Leaman, 978 F. Supp. at 607. The Armstrong trial court's statement on allocation, was quoted at length in Chemical Leaman:

This Court finds that the most equitable method of allocation is proration on the basis of policy limits, multiplied by years of coverage. This method is consistent with the policy language in that it takes policy limits into consideration . . . This method also reflects the fact that higher premiums are generally paid for higher "per person" or "per occurrence" limits. Since some policies are in effect for more than one year, and injury occurs during every year from first exposure to asbestos until death . . . multiplying the policy limits by years of coverage results in a more equitable allocation than proration based on policy limits alone. Thus, when a particular claim triggers more than one policy, each insurer's share of liability shall be determined by the proportion that each policy's applicable "per occurrence" limits multiplied by years the policy was in effect bears to the sum total of the applicable "per occurrence" limits of all triggered policies multiplied by the years each policy was in effect.

978 F. Supp. at 607, quoting Armstrong World Industries, 45 Cal. App.4<sup>th</sup> at 52.

The District Court then examined Armstrong's analysis of the nature of asbestos bodily injury in light of Owens-Illinois's injury-in-fact trigger. Under Owens-Illinois, coverage was triggered by a showing of actual injury or damage-producing event. Id. Under Armstrong, although damaging physiological processes begin almost immediately upon exposure to asbestos, "new and additional 'bodily injury' from asbestos continue[d] to occur even past the cessation of exposure" and continued through an affected individual's life. Id. The Chemical Leaman court found Armstrong equally applicable in an environmental property damage context, in that a discrete and separate injury occurred during every year of the triggered policies. Id. The court further believed that Owens-Illinois' injury-in-fact trigger was consonant with Armstrong's determination that a separate occurrence took place during each year and, as a result – and without any discussion of the language of the policies – directed that Chemical Leaman's three-year policies should be annualized. Id.

### **C. *Mennen v. Atlantic Mutual***

This rationale was also followed in another unreported decision, Mennen Co. v. Atlantic Mutual Insurance Co., No. 93-Civ.-5273 (D.N.J. Oct. 29, 1999), reprinted in Mealey's Litigation Reports: Insurance, Dec. 1, 1999.

In Mennen, the definition of "occurrence" in the three-year excess policies at issue was substantially similar to standard-form London Market excess language, and the policies did not contain any form of annualization clauses (either Provision A ("aggregate' shall apply separately") or Provision B ("limits . . . shall apply separately"). However, once

again the court did not base its decision on policy language. Rather, the court adopted the analysis in Chemical Leaman Tank Lines, concluding that under an injury-in-fact trigger, a continuous injury such as environmental property damage resulted in a separate and discrete occurrence during each year of each triggered policy. Slip op. at 11. Therefore, if the policyholder could show that continuous injury occurred over the three-year period of the policy, it was entitled to annualize the per occurrence limits of the policy, and recover a separate per occurrence limit each year. Id. at 11-12.

Chemical Leaman and Mennen present yet another uniquely-New Jersey approach to allocation of long-tail losses. Although these cases do not contribute to our understanding of how courts interpret policy language when addressing annualization, they nonetheless represent a reasonable interpretation of the injury-in-fact trigger as it applies to multi-year policies. Whether Chemical Leaman and Mennen will continue to be the law in New Jersey – and whether they will be adopted by other states – will undoubtedly be resolved during the upcoming decade.

## Conclusion

There are currently less than a dozen reported decisions on the issue of annualization. Even with this small body of case law, however, different courts addressing the same policy language have managed to reach diametrically opposing conclusions as to the policyholder's ability to recover more than one per occurrence limit in a three-year policy. A superficial reading of these decisions suggests that courts outside New Jersey

are increasingly ruling against annualization. However, a more thoughtful analysis reveals that in some of the cases disallowing annualization, notably Diocese II and Diamond Shamrock, the courts would have reached the opposite conclusion if faced with different policy language. Even insurance companies with multi-year policies have acknowledged to the courts in Hercules and Diocese I and II, that such policies should annualize if they contained the appropriate language.

Obviously, the pivotal issue – at least in cases decided outside New Jersey – is whether or not the policy in question contains an “annualization clause.” Unfortunately, exactly what constitutes an “annualization clause” has not yet been determined. Until there is considerably more case law on point, annualization will be a hotly contested issue, and neither policyholders nor insurance companies nor their counsel will be able to predict with any degree of accuracy how courts will respond.

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<sup>1</sup> The Insurance Services Office (“ISO”) is the insurance industry trade group that drafts standard-form insurance policy language for nearly all of the principal property and casualty insurance companies in the United States.

<sup>2</sup> Although not quoted in the decision, the North River policy contained an annualization provision similar to Provision B (“limits . . . shall apply separately”).

<sup>3</sup> Interestingly, the court did not annualize the S.I.R. either, but applied one S.I.R. on a pro rata basis across all triggered policies.